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To The Clerk of The Court:
Please docket and place this document in the public file.
LLS 7/11/13
Louis L. Stanton
U.S.D.J.

July 9, 2013

VIA HAND DELIVERY

Hon. Louis L. Stanton
United States District Court
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St., Room 2250
New York, NY 10007

Re: *Football Ass'n Premier League et al. v. YouTube Inc., et al.*, No. 07-CV-03582 (LLS) (S.D.N.Y.)

Dear Judge Stanton:

On behalf of YouTube, we write to follow up on the issues discussed with the Court at the conference held on June 28, 2013 and to request permission to file a renewed motion for summary judgment on the applicability of the DMCA safe harbor to plaintiffs' claims of infringement.

As the Court directed, the parties have reviewed the Final Judgment entered on August 10, 2010 (Dkt. 332) (attached as Ex. A). The Final Judgment, which was negotiated and agreed to by the parties, confirms (1) that "all" of plaintiffs' "remaining claims for relief" were "disposed of" by this Court's decision granting summary judgment to YouTube on the DMCA safe harbors and, more specifically, (2) that "plaintiffs do not seek injunctive relief in this action pursuant to 17 U.S.C. § 512(j)." Section 512(j) places strict limits on the scope of an injunction available in any case where the DMCA safe harbors apply. *See* S. Rep. No. 105-190, at 52 (1998). It sets forth the only form of injunctive relief available under section 502 of the Copyright Act (or any other provision of law) against a service provider protected by the DMCA. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). Plaintiffs' concession that they are not seeking an injunction under section 512(j) means that, if the Court determines that YouTube is entitled to the safe harbor against plaintiffs' infringement claims, there can be no injunction in this case.

At the conference and in subsequent correspondence between the parties, plaintiffs' counsel have indicated that they still have a claim for a *non-DMCA* injunction. But such an injunction—which would be possible only if YouTube is found not to qualify for the safe harbor and plaintiffs then were to prevail on their underlying

infringement claims—has no bearing on YouTube's motion for summary judgment. It certainly would not make sense to delay the adjudication of our motion on account of a request for injunctive relief that would be mooted if the motion succeeds. Nor is there any basis for conducting discovery on a claim for a non-DMCA injunction in connection with YouTube's DMCA motion. That motion is based exclusively on plaintiffs' clips-in-suit. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34 (2d Cir. 2012) ("By definition, only the current clips-in-suit are at issue in this litigation."); June 23, 2008 Hr'g Tr. at 3 (attached as Ex. B) ("The case ultimately must be tried on a closed universe of claims."). The last of those clips was removed from YouTube in 2009. Indeed, the deadline for identifying new works and clips at issue in this case passed nearly *four years ago*. *See* Oct. 28, 2009 Memorandum Endorsement (Dkt. 140) (denying plaintiff X-Ray Dog's untimely attempt to add additional works and clips-in-suit). The discovery that bears on YouTube's motion for summary judgment is necessarily limited to matters involving those clips and the YouTube service as it operated during the period when those clips were available on the service. On those matters, Plaintiffs have already taken exhaustive discovery over a three-year period.

For these reasons, YouTube respectfully seeks permission to file its summary judgment motion without further delay. *See Viacom*, 676 F.3d at 42 (directing this Court to "permit[] renewed motions for summary judgment as soon as practicable"). While we do not believe that plaintiffs need any additional discovery to respond to our motion, if they believe otherwise, the proper procedure is provided by Fed. R. Civ. P. 56(d). Under that rule, plaintiffs would have to show "by affidavit or declaration" that they cannot on the current record "present facts essential to justify [their] opposition." In keeping with the Second Circuit's decision, however, plaintiffs are precluded from seeking new discovery that relates to either knowledge or willful blindness (*Viacom*, 676 F.3d at 42), and they may not inquire into alleged infringements other than those represented by the now "closed universe" of clips-in-suit.

Respectfully submitted,

/s/ Andrew H. Schapiro

Andrew H. Schapiro

cc: All counsel of record (via e-mail)

Attachments

Exhibit A

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO. (together with its affiliate MURBO MUSIC PUBLISHING COMPANY, INC.), CHERRY LANE MUSIC PUBLISHING COMPANY, INC., CAL IV ENTERTAINMENT LLC, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, STAGE THREE MUSIC (US), INC., EDWARD B. MARKS MUSIC COMPANY, FREDDY BEINSTOCK MUSIC COMPANY d/b/a BIENSTOCK PUBLISHING COMPANY, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANÇAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, THE MUSIC FORCE LLC and SIN-DROME RECORDS, LTD on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

YOUTUBE, INC., YOUTUBE, LLC and GOOGLE INC.,

Defendants.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/10/10

07 Civ. 3582 (LLS)
(related case 07 Civ. 2103 (LLS))

ECF Case

FINAL JUDGMENT

YouTube Inc., YouTube, LLC, and Google Inc. ("Defendants"), having moved for summary judgment that they are protected by the safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512 et seq., for all of Plaintiffs' direct and secondary copyright infringement claims, and such motion having come before the Honorable Louis L. Stanton, United States District Judge, and the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ Opinion and Order granting the Defendants' motion for summary judgment; and LLS

Plaintiffs having moved for partial summary judgment against the Defendants' DMCA defense, and said motion having come before the Honorable Louis L. Stanton, United States District Judge, and

the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ Opinion and Order denying Plaintiffs' motion; and LLS

Plaintiffs having affirmed: (i) that all of their remaining claims for relief in this case are disposed of by the June 23, 2010 Order; (ii) that they do not seek injunctive relief in this action pursuant to 17 U.S.C. § 512(j); and (iii) that there are no claims for relief that still remain to be adjudicated, it is

ORDERED, ADJUDGED AND DECREED that for reasons set forth in the Court's ~~Memorandum Decision~~ Opinion and Order dated June 23, 2010, judgment is entered for Defendants and against Plaintiffs on all of Plaintiffs' claims. LLS

New York, New York
August 9, 2010

SO ORDERED:

Louis L. Stanton
Hon. Louis L. Stanton
United States District Judge

Entered:

Ruby J. Krajick
Clerk of Court

By: _____
Deputy Clerk of Court

Exhibit B

86neviac

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
VIACOM INTERNATIONAL, INC.,
Plaintiff,

v. 07 CV 2103(LLS)

YOUTUBE, INC.,
Defendant.
----------x
THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED,
Plaintiff,

v. 07 CV 3582(LLS)

YOUTUBE, INC.,
Defendant.
----------x

June 23, 2008
3:10 p.m.

Before:

HON. LOUIS L. STANTON,
District Judge

APPEARANCES

JENNER BLOCK
Attorneys for Plaintiff Viacom
BY: DONALD VERRILLI
SUSAN KOHLMAN

PROSKAUER ROSE, LLP
Attorneys for Plaintiff Football Assn. Premier League, Ltd.
BY: LOU SOLOMON
NOAH GITTERMAN

MAYER BROWN, LLP
Attorneys for Defendants YouTube
BY: ANDREW SCHAPIRO
MATTHEW INGBER

WILSON SONSINI GOODRICH & ROSATI
Attorneys for Defendant Youtube
BY: MICHAEL RUBIN

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

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(In open court)
(Case called)
THE COURT: I think you all sought this conference, and so I suppose you have an agenda. But in the meantime, and to make it more concrete, I think I'm ready to rule on the various points raised in the defendants' motion. And if that would help you all, I can do that right now.
Mr. Verrilli nods.

MR. VERRILLI: Yes, your Honor.
THE COURT: Is there anything else you want to say that isn't in your briefs that I've been reading before I rule? Anything you want to add to it?
MR. VERRILLI: I don't think so, your Honor.
THE COURT: Okay. Let me first start by saying with respect to the agonizing question about the search code in the opinion that I gave you on Friday, I'm a little unsure about the propriety of what I'm going to say, but I don't want anybody later to feel ambushed or surprised. And that is what entails me to give this caution with respect to that ruling. And the caution is directed towards the defendants.
I want to give them fair warning so that they're aware that subject to whatever rulings are made on a former briefing, they may not be allowed to base an argument at trial on any undisclosed characteristics of the search code without providing prior notice to the plaintiffs in time to allow

inquiry into and preparation, perhaps including whatever source code disclosures are necessary to meet that argument.
That's what I wanted to say. It's probably unnecessary, but the case will go better if nobody is taken by surprise or reads too much into any given ruling.
Now, with respect to the points raised in the defendants' motion, the first issue is as to identification of works in suit. Can you all hear me by the way?
(Counsel answers the affirmative in unison)
THE COURT: If you can't, wave your hand or something, I'll raise my voice.
All claims of infringement of the works in suit must be identified in time to be explored by the defendants before trial. And in practical terms, that probably means 90 days before the close of discovery. I don't think you or I should expect additions to be made to the list thereafter. The case ultimately must be tried on a closed universe of claims. So we'll close the list 90 days before discovery and not expect later additions, always bearing in mind that need for exceptions to a rule may occur. And, of course, that recognition informs all of my rulings on this motion as well. But I would treat exceptions as having to be proved to be exceptional indeed.
The plaintiffs, I suppose, need time to obtain and evaluate the additional discovery, which I've ordered by the

defendants. So I understand we'll be talking about schedule later. But at this point, not having heard you on it, I don't discern any major visible need for unrealistic interim deadlines. They may serve a purpose, and if so, we should impose them. But if they don't, and it's simply an administrative chore to keep track of them, then I don't see much need for interim deadlines, particularly ones that are probably unrealistic from their first moments.
With respect to a finite universe of claims, until discovery with respect to that uniform -- unified, defined universe is nearer completion, they may serve a purpose but I don't require them just as a matter of principle. It seems to me the process of rolling identifications seems to be going